No. 90-892

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

THE CITY OF SEATTLE,
Petitioner,

v

FIRST COVENANT CHURCH OF
SEATTLE, WASHINGTON
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF
WASHINGTON

MOTION FOR LEAVE TO FILE AND
BRIEF OF THE MUNICIPAL ART SOCIETY OF
NEW YORK, INC., *AMICUS CURIAE*, IN
SUPPORT OF THE PETITION

February 1991

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MOTION OF THE MUNICIPAL ART SOCIETY,
INC. TO FILE AS *AMICUS CURIAE* THE
ATTACHED BRIEF IN SUPPORT OF THE
PETITION

The Municipal Art Society of New York, Inc. moves for leave to file its *amicus curiae* brief:

-- to state the other constitutional question presented by the decision below; and

-- to submit that the erroneous answer of the decision below to this question is an additional reason why the petition should be granted.

The Society's brief does not repeat any argument made in the petition.

The other constitutional question presented:

> Is the Establishment Clause of the First Amendment violated by the exemption of a church building from landmark designation based upon the Free Exercise

Clause and the "public benefits associated with the practice of religious worship within the community"?

This question was necessarily (although tacitly) answered in the negative by the decision below.

That the decision below violates the Establishment Clause was argued to the court below in the brief, dated April 10, 1990, submitted by the Society and the National Center for Preservation Law, Inc., *amici curiae*, in support of the request of the City of Seattle for reconsideration; the request for reconsideration was denied without comment on September 12, 1990.

The Society has a real and substantial interest in the outcome of this case. The Society, a New York not-for-profit corporation, was organized in 1892. Its objective is "to work towards the creation of a livable city ... and, particularly, to use the Municipal Arts of Architecture, Landscape Architecture, Planning, Preservation and Public Art to improve and protect the physical environment of New York."

The Society's interest is further demonstrated by its participation as *amicus curiae* in numerous landmark decisions involving issues of preservation law:

Penn Central Transportation Co. v New York City, 438 U.S. 104 (1978);

Rector et al. of St. Bartholomew's Church v City of New York, 914 F.2d 348 (2d Cir.1990) (pet. for cert. pending);

Church of St. Paul and St. Andrew v Barwick, 67 N.Y. 2d 510, *cert. denied*, 479 U.S. 985 (1986);

Matter of Society for Ethical Culture v Spatt, 51 N.Y. 2d 449 (1980); and

Lutheran Church v City of New York, 35 N.Y. 2d 121 (1974).

The written consent of counsel for the petitioner is being filed with this motion. Counsel for the respondent has declined to consent.

The Society's motion should be granted.

February 1991 Respectfully submitted,

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BRIEF OF THE MUNICIPAL ART SOCIETY OF NEW YORK, INC., *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

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BRIEF OF THE MUNICIPAL ART SOCIETY OF NEW YORK, INC., *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

The Municipal Art Society of New York, Inc. (the "Society"), *amicus Curiae*, submits this brief:

-- to state the other constitutional question presented by the decision below; and

-- to submit that the erroneous answer of the decision below to this question is an additional reason why the petition should be granted.

CONSTITUTIONAL QUESTION

Is the Establishment Clause of the First Amendment violated by the exemption of a church building from landmark designation based upon the Free Exercise Clause and "the public benefits associated with the practice of religious worship within the community"?[1]

[1]That the decision below violates the Establishment Clause was argued to the Supreme Court in the brief, dated April

ADDITIONAL REASON

This constitutional question was necessarily (although tacitly) answered in the negative by the decision below. The answer was erroneous, and that constitutional error is an additional reason why the petition should be granted.

The essence of the decision below is stated in the penultimate paragraph of the opinion of the court. "Balancing" the two interests, the court held that "the aesthetic and community values associated with

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10, 1990, submitted by the Society and the National Center for Preservation Law, Inc., *amici curiae*, in support of the request of the City of Seattle for reconsideration; the request for reconsideration was denied without comment on September 12, 1990.

landmark preservation" are "clearly outweighed by the constitutional protection of free exercise of religion and the public benefits associated with the practice of religious worship within the community." (App. 18a)

This balancing and this weighting of the scales to exempt property owned by a religious organization from neutral regulation departs from the neutrality and secular purpose required by the Establishment Clause. Texas Monthly, Inc. v Bullock, __ U.S. ___, 109 S.Ct 890 (1989); Lemon v Kurtzmann, 403 U.S. 602, 612-13 (1971); Abingdon School District v. Schempp, 374 U.S. 206, 226 (1963); Engel v Vitale, 370 U.S. 421, 430

(1962); cf., Hernandez v Commissioner, ___ U.S. ___, 109 S.Ct. 2136, 2146-47 (1989).

While creating an exemption for property owned by a religious organization on the basis of the "public benefits associated with the practice of religious worship within the community," the court deprecated "aesthetic and community values associated with landmark preservation...." Aesthetic values, however, constitute a branch of philosophy and doctrine[2] as important (to identify only some of those

[2]"Aesthetics" and "aestheticism" are "a branch of philosophy dealing with beauty..." and "the doctrine that the principles of beauty are basic and that other principles (as of the good or the right) are derived from them..." *Webster's Third New International Dictionary* (1971).

interested) to the atheist and the agnostic as a house of worship may be to some, but not all, theists.

The Establishment Clause forbids the analysis made by the court below. "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic – the nonbeliever is entitled to go his own way." Engel v Vitale, *supra*, 370 U.S. at 443 (Douglas, J. concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

February 1991

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